Supreme Court, U. S.
FILED
NOV 7 1980
MICHAEL RODAK, JR., CLERK

No. 80-416

In the Supreme Court of the United States

OCTOBER TERM, 1980

MERCK & CO., INC., PETITIONER

v.

ELMER B. STAATS, COMPTROLLER GENERAL
OF THE UNITED STATES,
AND
UNITED STATES OF AMERICA

ON CONDITIONAL PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. This conditional petition for a writ of certiorari before judgment arises out of the Comptroller General's request to petitioner for access to designated cost records pursuant to the access-to-records provisions of federal procurement law. The background of this controversy is fully described in the submissions in *Staats* v. *Bristol Laboratories*, petition for cert. pending, No. 80-264 (filed Aug. 21, 1980), and *SmithKline Corp.* v. *Staats*, conditional petition for cert. before judgment pending, No. 80-434 (filed Sept. 18, 1980), and need only be briefly recounted here.

In 1973, petitioner entered into three contracts with the Defense Supply Agency of the Department of Defense and one contract with the Veterans Administration for the sale of pharmaceutical products to the government. Each of the four contracts was a negotiated fixed-price contract in which the price was based on petitioner's published catalogue price for the product; the total price for the contracts was in excess of $2.8 million (Pet. App. 1c, 2c; C.A. App. 34-39, 59-63, 462).[1] As required by 10 U.S.C. 2313(b)[2] and 41 U.S.C. 254(c),[3] each of the contracts contained a standard access-to-records clause in which petitioner agreed that the "Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract * * *, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract" (Pet. App. 1c-2c; C.A. App. 35, 37-38).

In August 1974, the Comptroller General wrote to petitioner to request access to designated records pursuant to the foregoing access-to-records provisions. The Comptroller General explained that the request was part of "a review of the procurement of drugs by agencies of

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[1]"C.A. App." refers to the joint appendix filed by the parties in the court of appeals.

[2]This provision is applicable to the Defense Supply Agency contracts.

[3]This provision is applicable to the Veterans Administration contract.

the Federal Government, including the pricing of drugs and pharmaceuticals procured under negotiated contracts" (C.A. App. 49). To that end, the Comptroller General sought to examine

> all books, documents, papers, and other records directly pertinent to the contracts, which includes, but are not limited to (1) records of experienced labor costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the Government, and (3) such other information as may be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests.

Pet. App. 2c; C.A. App. 49-50.

Petitioner refused to comply with the Comptroller General's request. On October 2, 1974, it commenced the present action in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief to bar GAO from access to its records. The United States subsequently intervened as a defendant and filed a counterclaim to require petitioner to allow the requested inspection (Pet. App. 1c; C.A. App. 5-8, 22-27).

Following discovery, the district court on August 12, 1977, granted in part and denied in part each side's motion for summary judgment (Pet. App. 1c-7c). The court rejected petitioner's arguments that the Comptroller General's request was based on the assertedly improper purpose "to gain access to [petitioner's] records in order to conduct an economic survey of the pharmaceutical industry" rather than the concededly proper purpose "to ensure that the prices [the government] pays are reasonable and appropriate" (*id.* at 2c), and that no cost

records were subject to disclosure because "the contract prices were not cost based" (*ibid.*). Instead, relying principally on *Hewlett-Packard Co.* v. *United States*, 385 F. 2d 1013 (9th Cir. 1967), cert. denied, 390 U.S. 988 (1968), the court held that GAO examination of records for non-cost-based contracts "accommodates [the] governmental interest in supervising and controlling the procurement process in precisely the manner intended by Congress * * * [and] that the survey proposed by the Comptroller in this case * * * will facilitate supervision of the procurement process and is within his authority" (Pet. App. 4c). Accordingly, the court declined to follow "the restrictive approach to [the] access-to-records clauses taken" by the district court in *Eli Lilly & Co.* v. *Staats*, a decision that was thereafter reversed by the Seventh Circuit. See 574 F. 2d 904 (7th Cir.), cert. denied, 439 U.S. 959 (1978).

With respect to the scope of access, however, the district court held (Pet. App. 4c-6c) that access should be limited to records of manufacturing and delivery costs in accordance with the district court's decision in *Bristol Laboratories* v. *Staats*, 428 F. Supp. 1388 (S.D. N.Y. 1977), aff'd, 620 F. 2d 17 (2d Cir. 1980), petition for cert. pending, No. 80-264 (filed Aug. 21, 1980). On this ground, the court denied GAO access to records concerning petitioner's unallocated costs of research and development, marketing and promotion, distribution, and administration (Pet. App. 5c).

Pursuant to its opinion, the court entered partial summary judgment for each side and ordered

> that the Comptroller General of the United States and his duly authorized representatives have the right to examine all books, documents, papers or records

> directly pertaining to the pricing and cost of producing the items furnished by [petitioner] under the following contracts * * *, including manufacturing costs (including raw and packaging materials, labor and fringe benefits, quality control and supervision), manufacturing overhead (including plant administration, production planning, warehousing, utilities and security), royalty expenses, and delivery costs; and it is
>
> FURTHER ORDERED, that defendant Comptroller General shall not demand access to books, documents, papers, or records with respect to research and development, marketing and promotion, distribution, and administration (except to the extent such data may be included in the cost items listed above) * * *.

Pet. App. 6c.[4]

On March 14, 1979, the government filed a notice of appeal to the United States Court of Appeals for the District of Columbia Circuit, and on March 21, 1979, petitioner noted a cross-appeal (C.A. App. 520-524). The case is still pending on appeal in that court; all briefs have been submitted, and oral argument was heard on February 11, 1980.

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[4]On petitioner's motion to alter or amend the judgment, the district court entered a revised judgment on January 24, 1979 (Pet. App. 1b-5b; C.A. App. 517). Among other things, the revised judgment added provisions to protect the confidentiality of records produced by petitioner pursuant to GAO's request, but it did not alter the scope of access afforded GAO by the initial order (Pet. App. 2b).

2. In this conditional petition for a writ of certiorari before judgment, petitioner urges, first, that the Court should deny the government's petition for certiorari in *Staats* v. *Bristol Laboratories*, No. 80-264 (filed Aug. 21, 1980), and, second, that if the Court grants the petition in *Bristol*, the instant petition should also be granted to consider two issues that are not involved in *Bristol* and do not present a conflict in the circuits.

Precisely the same issues are raised by the conditional petition for a writ of certiorari before judgment in *SmithKline Corp.* v. *Staats*, No. 80-434 (filed Sept. 18, 1980). For the reasons stated in our brief in opposition in *SmithKline* and in our submissions in *Bristol*,[5] we believe that the Court should grant the *Bristol* petition and deny the instant petition for certiorari before judgment.

It is therefore respectfully submitted that the conditional petition for a writ of certiorari before judgment should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1980

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[5]We are providing petitioner with a copy of these documents.

DOJ-1980-11